LIBRARY
SUPREME COURT. U. S.

Office - Supreme Court, U.S.
FILED
AUG 7 1958
JOHN T. FEY, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No. 104

QUENTIN STROUD, ET AL.,

Petitioners,

vs.

EZRA TAFT BENSON, SECRETARY OF AGRICULTURE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF OF PETITIONERS

JESSE A. JONES,
Kinston, North Carolina,
Attorney for Plaintiffs, Appellants.

JONES, REED & GRIFFIN,
Kinston, North Carolina.
M. E. CAVENDISH,
Greenville, North Carolina.

INDEX

	Pages
Statement	1
Argument	3

CITATIONS

Cases:

Alabama Power Company v. *Ickes*, 302 U.S. 464 (467-468)	9
Champion Refining Company v. *Corporation Commission*, 286 U.S. 210	5
Colorado v. *Tull*, 268 U.S. 225	4
Crenick v. *Rutter*, 265 U.S. 388	4
Desmeeker v. *U.S.*, 297 U.S. 167 (172)	7
Garfield v. *U.S.*, 211 U.S. 240 (260)	4
Lynch v. *U.S.*, 292 U.S. 571 (579)	7
National Labor Relations Board v. *Express Publishing Company*, 312 U.S. 426	4
Parker v. *Brown*, 317 U.S. 341 (352)	8
Stark v. *Wickard*, 321 U.S. 288 (303)	5
U.S. v. *American Railway Corporation*, 265 U.S. 435	3
U.S. v. *Babcock*, 250 U.S. 328 (331)	8
U.S. v. *Borden Company*, 308 U.S. 188 (199)	9
U.S. v. *Butler*, 297 U.S. 1	6
U.S. v. *Cox*, 9 L.Ed. 671	4
U.S. v. *Rock Royal Co-op.*, 307 U.S. 533	8
Webster v. *Fall*, 266 U.S. 507	4
Williams v. *Fanning*, 332 U.S. 490 (493)	3
Yarnell v. *Hillsboro Pacing Company*, 70 Fed. 2d 435	4

Statutes:

92 ALR 1582 et seq. (Anno.)	4
1949 Agricultural Act	6

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No. 104

QUENTIN STROUD, ET AL.,

Petitioners,

vs.

EZRA TAFT BENSON, SECRETARY OF AGRICULTURE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF OF PETITIONERS

Statement

The identification of tobacco upon a variety basis under the challenged rules and regulations was done by persons referred to as "specialists" who had had three days training (Pet. C.A. Rep. App. 43); (Resp. C.A. App. 84). Cultural practices, seasons and soil textures influence the chemical analysis of tobacco (Pet. A.A. App. 85). Tobacco produced from the same seed bed and transplanted

to different fields, was identified as different varieties. (Pet. C.A. App. 65-66).

The varieties Coker 139, 140 and Dixie Bright 244, can be identified during the progress of auction sales (Resp. A.A. App. 215), (Pet. C.A. Resp. App. 66). Coker 139, when it was on the market in major production, led all other varieties in average sale price. (Pet. C.A. App. 57-58). There is no known way to determine flavor and aroma other than smoking the tobacco (Resp. C.A. App. 135-136).

Tobacco manufacturers and dealers have followed the practice of chemically analyzing tobacco prior to the auction sale season for several years. (Pet. C.A. App. 76). The quantity of tobacco obtained as samples for use in chemical analysis is insufficient to accurately determine the chemical content of a field of tobacco. (Pet. C.A. App. 89, 91).

The challenged regulations referred to varieties "Coker 139, 140 and Dixie Bright 244" (Pet. Ex. 4; Pet. C.A. Brief, 67). Until June 11, 1957, when the so-called discount varieties were defined as "Coker 139, Coker 140 or Dixie Bright 244, or any mixture or strain of such seed varieties * * *, growth characteristics similar to the varieties of flue-cured tobacco designated as Coker 139, Coker 140 or Dixie Bright 244 or a mixture or strain of such seed varieties". This enlarged the area of identification. (Pet. C.A. App. 83). The determination as to varieties was ex parte. (Pet. C.A. Brief, Ex. F. 7, 8, 10). The regulations were adopted too late in the crop year for Petitioners to produce other varieties of tobacco and after 60 per cent of the crop expense had been incurred. (Pet C.A. Rep. App. 52-53).

Prior to the 1957 auction sale season basket tickets showed only the pounds and the grade, no indication of the type card held by the producer (Resp. C.A. App. 53).

The presence of the striped card removed the tobacco from auction sale Resp. C.A. App. 50, 54). Tobacco companies for centuries prior to 1958 exercised their own judgment in the purchase of tobacco, including auction markets, (Resp. C. A. App. 64-65).

A. The validity of the 1957 Tobacco Loan Program and Variety Identification Regulations is not to be determined upon the condition of the foreign tobacco trade status or the benefits which might result from their enforcement.

Argument

I

A. The Petitioners concede that the Secretary of Agriculture is not before the Court unless his participation in the trial of the case upon its merits and his failure to appeal from the decree of the Court dc ying his motion to dismiss brings him in Court and estops him from now challenging Petitioners' contention that he is before the Court.

The Secretary of Agriculture is not an indispensable party to this action. *U. S.* v. *American Railway Corporation*, 265 U.S. 435, in which the Court stated:

> "It is true that a party who does not appeal from a final decree of the trial Court cannot be heard in opposition thereto when the case is brought here by the appeal of the adverse party".

Williams v. *Fanning*, 332 U. S. 490 (493), in which the Court states:

> "These cases evolve the principle that the superior officer is an indispensable party if the decree granting the relief sought will require him to take action, either by exercising directly a power lodged in him, or by having a subordinate exercise it for him",

and further:

> "That result followed 268 U. S. 230 by analogy to those cases which permit suit against a public official who invades a private right either by exceeding his authority as by carrying out a mandate of his superior".

92 A. L. R. 1582, et seq. (Anno.), states:

> "We agree at once that the Secretary, not being before the Court, could not be enjoined from enforcing his regulations. . . . But if those regulations are indeed invalid, the control committee cannot shield themselves behind the Secretary, or compel compliance therewith in his name".

U. S. v. *Cox*, 9 L. Ed. 671.
Yarnell v. *Hillsboro Pacing Company*, 70 Fed. 2d 435.
Crenich v. *Rutter*, 265 U. S. 388.
Webster v. *Fall*, 266 U. S. 507.
Colorado v. *Tull*, 268 U. S. 225.

The annotation further states:

> "It follows that the Secretary was not an indispensable party".

Garfield v. *U. S.*, 211 U. S. 240 (260) (Quotation, Pet. C. A. Brief 30-31).
National Labor Relations Board v. *Express Publishing Company*, 312 U.S. 426 (Quotation, Pet. C. A. Brief, 32).

Petitioners have challenged the validity of the regulations through which tobacco was and is being identified upon a variety basis, and the varieties classed as undesirable supported at 50 per cent of parity. *Title 7 USCA, 1441*, (App.

Resp. Brief, 23) authorizes and directs the Secretary of Agriculture "to make available through loans, purchases, or other operations, price support to cooperators for any crop of any basic agricultural commodity if producers have not disapproved marketing quotas for such crops, at a level not in excess of ninety per centum of the parity price of the commodity nor less than the level provided in subsections (a), (b), and (c), as follows: * * *

> (c) For tobacco, if marketing quotas are in effect, the level of support shall be 90 per centum of the parity price".

B. The Petitioners seek the benefits to which they are entitled under the program unaffected by the challenged regulations which they contend are void. They are entitled to have the parties who are before the Court restrained from enforcing the void regulations. *Champion Refining Company* v. *Corporation Commission,* 286 U. S. 210, (Quotation, Pet. C. A. Brief, 31).

C. Petitioners are within quota producers and cooperators within the meaning of *7 USCA, 1441,* and entitled to have their tobacco supported at 90 per cent of parity. No market for their crops was or is available to them other than the auction sale market. They have earned the right to have their tobacco supported at 90 per cent of parity by complying with all regulations of the Secretary of Agriculture. The regulations which they have approved are agreements with the United States Government and as such they are entitled to have the Government comply with the terms and provisions of the agreement which includes 90 per cent of parity for their tobacco. *Stark* v. *Wickard,* 321 U. S. 288 (303), in which the Court states:

> "The statute and orders create a right in the producer to avail himself of the protection of a minimum price

> afforded by Government action. Such a right created by statute is mandatory in character and obviously capable of judicial enforcement":

and further, (304):

> "Under such circumstances we think the producers have legal standing to object to illegal provisions of the orders";

and further, (306):

> "When, as we have previously concluded in this opinion, definite personal rights are created by Federal statute similar in kind to those customarily treated in Courts of law; the silence of Congress as to judicial review is, at any rate, in the absence of an administrative remedy, not to be construed as a denial of authority to the aggrieved person to seek appropriate relief in the Federal Courts in the exercise of their general jurisdiction; when Congress passes an act empowering administrative agencies to carry on governmental activities the power of those agencies is circumscribed by the authority granted".

If the 1949 Agricultural Act which in fact was an Amendment to the Agricultural Adjustment Act, vests in the Secretary of Agriculture the powers claimed by the defendants in this action, it is unconstitutional and void.

U. S. v. *Butler*, 297 U. S. 1.

II.

A. The Marketing Agreement Act and the Act referred to by defendants as "Agricultural Act of 1949" are in pari materia. Orders and regulations when approved by referendum by the producers become agreements. *Title 7 USCA 515 and 608b.* Compliance by producers with all the regu-

lations relating to the production of a crop within the purview of the Acts qualifies them as cooperators. One of the rights under the agreement is 90 per cent of parity, which right they are privileged to enforce through the courts. *Lynch* v. *U. S.*, 292 U. S. 571 (579), the Court stated:

> "The Fifth Amendment commands that property be not taken without just compensation. Valid contracts are property, whether the obligor be a private individual, a municipality, a state or the United States. Rights against the United States arising out of a contract with it are protected by the Fifth Amendment * * *. When the United States enters into contract relations, etc., rights and duties therein are governed generally by the law applicable to contracts between private individuals".

The Secretary of Agriculture does not have the right to deny to the Petitioners 90 per cent of parity and all other rights accruing to them under the terms of their agreement with the United States. In the case of *Desmiecker* v. *U. S.*, 297 U. S. 167 (172), the Court stated:

> "But the power of the administrative officer will not in the absence of a plain command, be deemed to extend to the denial of a right which the statute creates, and to which the claimant, upon facts found or admitted by the administrative officer, is entitled".

B. Title 7 USCA, Chapters 21A—Tobacco Inspection; 21B—Tobacco Control; Chapter 26—Agricultural Adjustment; Chapter 35—Agricultural Adjustment Act of 1938; Chapter 35A—Price Support of agricultural commodities, as amended, defines tobacco as follows:

> Sec. 511: "Tobacco means tobacco in its unmanufactured form".

Sec. 515a: "Kind of tobacco means one or more types of tobacco as classified in Service and Regulatory Announcement numbered 118 of the Bureau of Agricultural Economics of the United States Department of Agriculture as listed below according to the name or names by which known:

Types 11, 12, 13, and 14 known as flue-cured tobacco".

The Secretary has no discretion in the administration of the Act.

U. S. v. *Rock Royal Co-Op.*, 307 U. S. 533, the Court states:

"The Secretary is not permitted freedom of choice as to the commodities he may attempt to aid by an order." "He is limited to the procedures prescribed by the Acts."

U. S. v. *Babcock*, 250 U. S. 328 (331), the Court stated:

"That where a statute creates a right and provides a special remedy, that remedy is exclusive".

Parker v. *Brown*, 317 U. S. 341 (352), the Court states:

"The statute itself exercises its legislative authority in making the regulation and in prescribing the conditions of its application. The required vote on the referendum is one of these conditions".

The rules and regulations being enforced by the defendants are not agreements and are in violation of the anti-trust laws, resulting in irreparable injury and damage to Petitioners and entitling them to the relief sought.

U. S. v. *Borden Company*, 308 U. S. 188 (199); in which the Court states:

> "The statutory program to be followed under the Agricultural Act requires the participation of the Secretary of Agriculture who is to hold hearings and make findings * * *. The methods which the Agricultural Act permits to obtain that result are two-fold, marketing agreements and orders. To give validity to marketing agreements, the Secretary must be an actual party to the agreement * * * As to agreements and arrangements not thus agreed upon or directed by the Secretary, the Agricultural Act in no way impinges upon the prohibitions and penalties of the Sherman Act, and its condemnation of private action in entering into combinations and conspiracies which impose the prohibited restraint upon interstate commerce remains untouched";

and further (201):

> "If Congress had desired to grant any further immunity, Congress doubtless would have said so".

Alabama Power Company v. *Ickes*, 302 U. S. 464 (467-468), the Court stated:

> "Public officials owe a duty to refrain from interfering with the property or business of the plaintiffs and from injuring them therein without authority or in abuse of it. When an Act, in violation of this duty will be the proximate cause of consequences to the plaintiff so substantial and onerous as to be comparable to injustices which the law is accustomed to note as legal damage, a cause of action arises with the right to an injunction".

Petitioners have brought themselves well within the principles embodied in the statutes and decisions cited, entitling them to have writ of certiorari granted to the end that the relief sought may be made available to them, and that justice may prevail.

Respectfully submitted,

JESSE A. JONES,
Kinston, North Carolina,
Attorney for Plaintiffs, Appellants.

JONES, REED & GRIFFIN,
Kinston, North Carolina.
M. E. CAVENDISH,
Greenville, North Carolina.